

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SONNARY TINA CHHIM, 	Petitioner,
v.	
DEBRA JOHNSON, Warden, 	Respondent.

Civil No. 13cv0961-LAB (KSC)

ORDER:

(1) DISMISSING CASE WITHOUT PREJUDICE; and,

(2) NOTIFYING PETITIONER OF OPTIONS TO AVOID FURTHER DISMISSAL

Petitioner is a state prisoner proceeding pro se with a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner has neither paid the filing fee nor filed a request to proceed in forma pauperis, and the Petition is therefore subject to dismissal without prejudice for failure to satisfy the filing fee requirement. In addition, although Petitioner indicates that she has presented claims 4-6 to the state supreme court, there is no indication that the remaining claims were presented to that court. Accordingly, the Petition is also subject to dismissal as a “mixed” petition, that is, one containing both exhausted and unexhausted claims. The Court will notify Petitioner of her options to avoid a future dismissal of a mixed petition.

FAILURE TO SATISFY THE FILING FEE REQUIREMENT

Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See

1 Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, she must submit
 2 a copy of this order along with the requisite fee or file a motion to proceed in forma pauperis no
 3 later than **June 24, 2013**, to have the case reopened.

4 **MIXED PETITION**

5 In addition, Petitioner has not alleged exhaustion of her state court remedies as to all
 6 claims presented in the Petition. Although Petitioner indicates that she has presented claims 4-6
 7 to the state supreme court, there is no indication that the remaining claims have been presented
 8 to the state supreme court. (See Pet. at 3-14.) If the Petition contains both exhausted and
 9 unexhausted claims, it is a “mixed” petition and subject to dismissal. See Rose v. Lundy, 455
 10 U.S. 509, 514, 520-21 (1982) (holding that “a district court must dismiss such ‘mixed’ petitions,
 11 leaving the petitioner with the choice of returning to state court to exhaust his claims or of
 12 amending or resubmitting the habeas petition to present only exhausted claims to the district
 13 court.”)

14 The exhaustion requirement is satisfied by providing the state courts with a “fair
 15 opportunity” to rule on Petitioner’s constitutional claims. Anderson v. Harless, 459 U.S. 4, 6
 16 (1982). In most instances, a claim is exhausted once it is presented to a state’s highest court,
 17 either on direct appeal or through state collateral proceedings.¹ See Sandgathe v. Maass, 314
 18 F.3d 371, 376 (9th Cir. 2002).

19 To avoid the Court dismissing the Petition on its own accord once Petitioner satisfies the
 20 filing fee requirement and has the case reopened, Petitioner may choose one of these options.

21 **i) First Option: Demonstrate Exhaustion**

22 Petitioner may file further papers with this Court to demonstrate that she has in fact
 23 exhausted claim 4. If Petitioner chooses this option, her papers are due by **June 24, 2013**.

24
 25 ¹ 28 U.S.C. § 2254 (b)(1)-(2) states:

26 (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the
 judgment of a State court shall not be granted unless it appears that -

27 (A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that
 render such process ineffective to protect the rights of the applicant.

28 (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure
 to the applicant to exhaust the remedies available in the courts of the State.

1 **ii) Second Option: Voluntarily Dismiss the Petition**

2 Petitioner may move to voluntarily dismiss her entire federal petition and return to state
3 court to exhaust her unexhausted claims. Petitioner may then file a new federal petition
4 containing only exhausted claims. See Rose, 455 U.S. at 510, 520-21 (stating that a petitioner
5 who files a mixed petition may dismiss his petition to “return[] to state court to exhaust his
6 claims”). If Petitioner chooses this second option, she must so inform the Court no later than
7 **June 24, 2013**.

8 Petitioner is cautioned that any new federal petition must be filed before expiration of the
9 one-year statute of limitations. Ordinarily, a petitioner has one year from when her conviction
10 became final to file her federal petition, unless she can show that statutory or equitable “tolling”
11 applies. Duncan v. Walker, 533 U.S. 167, 176 (2001); 28 U.S.C. § 2244(d).² The statute of
12 limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C.
13 § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). But see Artuz v.
14 Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery
15 and acceptance [by the appropriate court officer for placement into the record] are in compliance
16 with the applicable laws and rules governing filings.”); Bonner v. Carey, 425 F.3d 1145, 1149
17 (9th Cir. 2005) (holding that a state application for post-conviction relief which is ultimately
18 dismissed as untimely was neither “properly filed” nor “pending” while it was under
19 consideration by the state court, and therefore does not toll the statute of limitations), as

20 _____
21 ² 28 U.S.C. § 2244 (d) provides:

22 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in
custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

23 (A) the date on which the judgment became final by the conclusion of direct review or the
expiration of the time for seeking such review;

24 (B) the date on which the impediment to filing an application created by State action in violation
of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by
such State action;

25 (C) the date on which the constitutional right asserted was initially recognized by the Supreme
Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to
26 cases on collateral review; or

27 (D) the date on which the factual predicate of the claim or claims presented could have been
discovered through the exercise of due diligence.

28 (2) The time during which a properly filed application for State post-conviction or other collateral review
with respect to the pertinent judgement or claim is pending shall not be counted toward any period of
limitation under this subsection.

1 amended 439 F.3d 993. However, absent some other basis for tolling, the statute of limitations
 2 continues to run while a federal habeas petition is pending. Duncan, 533 U.S. at 181-82.

3 **iii) Third Option: Formally Abandon Unexhausted Claims**

4 Petitioner may formally abandon her unexhausted claims and proceed with her exhausted
 5 claims. See Rose, 455 U.S. at 510, 520-21 (stating that a petitioner who files a mixed petition
 6 may “resubmit[] the habeas petition to present only exhausted claims”). If Petitioner chooses
 7 this option, she must file a pleading with this Court no later than **June 24, 2013**.

8 Petitioner is cautioned that once she abandons her unexhausted claims, she may lose the
 9 ability to ever raise them in federal court. See Slack v. McDaniel, 529 U.S. 473, 488 (2000)
 10 (stating that a court’s ruling on the merits of claims presented in a first § 2254 petition renders
 11 any later petition successive); see also 28 U.S.C. § 2244 (a)-(b).³

12 **iv) Fourth Option: File a Motion to Stay the Federal Proceedings**

13 Petitioner may file a motion to stay this federal proceeding while she returns to state court
 14 to exhaust her unexhausted claims. There are two methods potentially available to Petitioner,
 15 the “stay and abeyance” procedure and the “withdrawal and abeyance” procedure.

16 If Petitioner wishes to use the “stay and abeyance” procedure she should ask the Court
 17 to stay her mixed petition while she returns to state court to exhaust. Under this procedure she
 18 must demonstrate there are arguably meritorious claim(s) which she wishes to return to state
 19 court to exhaust, that she is diligently pursuing her state court remedies with respect to those
 20 claim(s), and that good cause exists for her failure to timely exhaust her state court remedies.
 21 Rhines v. Webber, 544 U.S. 269, 277-78 (2005).

22 If Petitioner wishes to use the “withdrawal and abeyance” procedure, she must voluntarily
 23 withdraw her unexhausted claim(s), ask the Court to stay the proceedings and hold the
 24

25 ³ 28 U.S.C. § 2244(b)(2) provides that a claim presented in a second or successive habeas corpus application under
 26 § 2254 shall be dismissed unless:

27 (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases
 on collateral review by the Supreme Court, that was previously unavailable; or

28 (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise
 of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be
 sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable
 factfinder would have found the applicant guilty of the underlying offense.

1 fully-exhausted petition in abeyance while she returns to state court to exhaust, and then seek
 2 permission to amend her petition to include the newly exhausted claim(s) after exhaustion is
 3 complete. King v. Ryan, 564 F.3d. 1133, 1135 (9th Cir.2009). Although under this procedure
 4 Petitioner is not required to demonstrate good cause for her failure to timely exhaust, the newly
 5 exhausted claim(s) must be either timely under the statute of limitations or “relate back” to the
 6 claim(s) in the fully-exhausted petition, that is, they must share a “common core of operative
 7 facts” with the previously exhausted claim(s). King, 564 F.3d at 1141, quoting Mayle v. Felix,
 8 545 U.S. 644. 659 (2005).

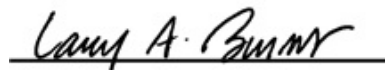
9 If Petitioner chooses this fourth option, she must file a pleading with this Court no later
 10 than **June 24, 2013**.

11 **CONCLUSION AND ORDER**

12 This case is **DISMISSED** without prejudice due to Petitioner’s failure to satisfy the filing
 13 fee requirement. If Petitioner wishes to proceed with this action she must pay the filing fee or
 14 file a motion to proceed in forma pauperis on or before **June 24, 2013**. In addition, the Court
 15 **NOTIFIES PETITIONER THAT SHE HAS FILED A PETITION THAT CONTAINS**
 16 **BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS AND IT IS THEREFORE**
 17 **SUBJECT TO DISMISSAL**. If Petitioner fails to respond to this Order by choosing one of the
 18 options outline above by **June 24, 2013**, the Petition will be dismissed without prejudice on the
 19 basis that it contains both exhausted and unexhausted claims.⁴ See Rose, 455 U.S. at 522. The
 20 Clerk of Court shall send Petitioner a blank Southern District of California in forma pauperis
 21 application along with a copy of this Order.

22 IT IS SO ORDERED.

23 DATED: April 24, 2013

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25 **HONORABLE LARRY ALAN BURNS**
 26 United States District Judge

27
 28 ⁴ Although the dismissal is “without prejudice,” Petitioner is again cautioned that any later federal petition may be
 barred by the statute of limitations. See 28 U.S.C. § 2244(d)(1)-(2); see also footnote two of this Order.